No. 80-569

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LOCAL 1830 AND LOCAL 1833,
GENERAL LONGSHORE WORKERS,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO,

Petitioners,

v.

ALTON J. BAILEY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF RESPONDENT, ALTON J. BAILEY, IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS AND ISSUES PRESENTED

1. The Court of Appeals did not err—but is eminently correct—in maintaining that under F.R.C.P. Rule 60(b)(5) and (6) the District Court was not in anywise compelled to deviate from its decision of March 11, 1976, on which the Mandate was issued July 25, 1976; because that decision reported and cited as 528 F.2d 551 (App. C, 12a-24a), requiring the merger of two (2) racially-segregated unions (Local 1830 [black] and Local 1833 [white], General Longshore Workers, ILA, AFL-CIO), is not *illegal* and *unjust*; and, therefore, that decision of the Court of Appeals remains undisturbed under the subsequent decision of this Court of May 31, 1977, in the case of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 97 S. Ct. 1891, 14 FEP Cases 1505 (May 31, 1977).

2. Whether the Court of Appeals erred in holding that this Court's decision in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), did not permit the District Court's failure to implement the mandate of the Court of Appeals ordering the desegregation of racially-segregated local unions?

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BRIEF ON BEHALF OF RESPONDENT, ALTON J. BAILEY, IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent, ALTON J. BAILEY, appealed to the United States Court of Appeals, Fifth Circuit, from an order of the United States District Court for the Middle District of Louisiana altering the mandate of the Court of Appeals to desegregate two racially-segregated unions by refusing to order merger and dismissing the suit. The District Court held that it need not comply with the mandate of the Court of

Appeals because of what it deemed to be relevant intervening decisional law.

This is a Title VII employment discrimination action brought over nine years ago by respondent, ALTON J. BAILEY, against five stevedoring companies and two racially-segregated longshoremen's local unions in the Baton Rouge, Louisiana area, Local 1830 (all black) and Local 1833 (all white), International Longshoremen's Association. Mr. Bailey, a black longshoreman member of Local 1830, alleged that the maintenance of the racially-segregated locals and the allocation of longshoremen's work on a 50%-50% basis between the memberships of the two locals, thereby giving the members of the smaller white union proportionately greater opportunities to work, constituted violations of Title VII. He asked that the locals be ordered merged. In addition to these allegations concerning the racially-segregated locals, Mr. Bailey alleged other Title VII violations directed at him individually or against black longshoremen as a group. His complaint sought class certification. 7 FEP Cases 915; 7 EPD ¶ 9424, pp. 8767-68.

After trial in 1974, the District Court held that the racially-segregated character of the locals did not violate Title VII and that, because the size of the unions during the post-Act period was roughly equivalent, the 50%-50% rule did not have a discriminatory effect. The District Court found no substance to Mr. Bailey's other claims and denied class certification because the District Court found there were no common issues of fact and because 204 of the 230 members of the black union notified the court that they did not wish to be represented by Mr. Bailey. 7 FEP Cases 917-19; 7 EPD ¶ 9424, pp. 7869-73.

On appeal, the Court (JJ. Coleman, Ingraham and O'Kelley) affirmed the denial of the class action certification and dismissal of all of Mr. Bailey's claims other than those involving the racially-segregated locals. 528 F.2d 551 (1976).

The Court of Appeals reversed as to the racially-segregated locals. Relying on prior decisions of the Court discussing the harm caused union members by racial segregation, it held the segregated locals unlawful on the grounds that "because of the inevitable fluctuation in union membership, there is a *real possibility* for discriminatory treatment" of Bailey and other blacks. *Id.* at 557. Accordingly, the Court of Appeals said:

> [W]e conclude that the district court erred when it refused to grant appellant's motion for permanent injunction against the continued operation of segregated locals. The 50%-50% hiring practice represents a threat of employment discrimination and thus violates 42 U.S.C. § 2000e-2(c)(2), [1] which makes an employment practice unlawful if it "would deprive or tend to deprive" an individual of employment opportunities. It is unnecessary to reach the issue of whether segregated locals represent a *per se* violation of the 1964 Civil Rights Act. *Id.*

The unions petitioned for rehearing, which the Court of Appeals denied, and suggested rehearing *en banc*, which the Court also denied, Judge Clark dissenting. 533 F.2d 976 (1976). The unions then petitioned for *certiorari*, which this Court denied in January, 1977. 429 U.S. 1052.

In March, 1977, Mr. Bailey moved for a pre-trial conference respecting the implementation of the mandate of the Court of Appeals. On July 6, 1977, a week before the pre-trial conference was scheduled, all defendants moved for modification of the mandate pursuant to Rules 60(b)(5) and (6), F.R.Civ.P., asserting that the mandate, judgment or order of

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[1] § 703(c)(2) of Title VII, 42 U.S.C. § 2000e-2(c)(2), reads, in relevant part:

> It shall be an unlawful employment practice for a labor organization . . . to limit, segregate, or classify its membership or applicants for membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race . . .

the Court of Appeals is contrary to law and recent decisions of the Supreme Court of the United States in that prior cases and theories on whch it is based has been reversed or otherwise vacated and it is no longer equitable that the judgment should have prospetcive application.

The District Court granted the defendants' motion six months later in January of 1978. 16 FEP Cases 710, 16 EPD ¶ 8223. It held that a change in decisional law could be an appropriate basis for the District Court to modify a court of appeals' mandate pursuant to Rule 60(b) and that the District court could do so without leave of the Court of Appeals. 16 FEP Cases at 710-11, 16 EPD ¶ 8223, pp. 5165-66. Of the cases relied on by the unions and employers, the District Court found only *Rodriguez v. East Texas Motor Freight*, 431 U.S. 395 (1977), to be relevant to the issues before it.[2] The District Court wrote:

> . . . That suit [Rodriguez] was brought by Mexican Americans claiming racial and ethnic discrimination due to their initial rejection for line driver jobs under the company's "no-transfer" policy and the subsequent discriminatory effect that this allegedly had on their seniority. Under the "no-transfer" plan, a city driver was forced to resign, and therefore lose seniority, in order to secure the more lucrative line-driver jobs. The plaintiffs in that case did not have the action certified as a class action. On the individual action, the plaintiffs clearly did not shoulder their burden of proof. The District Court dismissed, for the primary reason that a large majority of the union had only recently rejected a merger of the seniority lists of the two groups of drivers, and that the plaintiffs lacked the necessary qualifications for the line-driver jobs. The Court of Appeals also rejected the plaintiffs' individual claims, but on its own motion

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[2] The defendants also relied on the decisions in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); and United Air Lines v. Evans, 431 U.S. 553 (1977).

recognized the plaintiffs as representatives in the class action. The Supreme Court reversed the Court of Appeals, stating that Rule 23 requisites had not been complied with. But of even more significance is the fact that the Court did not see fit to consider whether there was discrimination present or not. As in the present case, the courts in both the individual and class actions ruled against the plaintiff. But the Supreme Court then remanded the case on the class action issue. In so doing, the Court made it clear that the plaintiffs could not, on their own, without proof of individual or class discrimination, force liability on the defendants. The pertinent language is as follows:

> "The district court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus they could have suffered no injury as a result of the alleged discriminatory practices, and they were therefore simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to the initial hire. In light of that stipulation, they are hardly in a position to mount a class-wide attack on the no transfer rule and seniority system . . ." [431 U.S. at 403-04;] 97 S.Ct. at page 1897. Factually the present case is very similar. The plaintiff in the case before us was found by both this court and the Court of Appeals to have no claim either individually or as a class representative, yet liability was imposed upon the defendants. To follow the mandate of the Court of Appeals, and to order a merger of the two unions in this case would impose liability upon the defendants in a situation analogous to that found in *East Texas Motor Freight*, and this, we believe, would be contrary to the Supreme Court's ruling in that case. In the present case, it was determined by both this Court and the Court of Appeals that

> the plaintiff had suffered no racial discrimination at the hands of any of the defendants, and it was likewise determined by both Courts that no member of the alleged class had been discriminated against by these defendants. Both the Courts concluded that the plaintiff was not representative of a class, and thus, as in the *East Texas Motor Freight* case, he is "hardly in a position to mount a class-wide attack on" . . . the defendants in this case. Thus, this Court concludes that under the law enunciated in *East Texas Motor Freight*, the defendants simply cannot win as they did in both Courts here, and still be cast in judgment. [Cf. 443 F.Supp. 899 (M.D. La. 1978), 16 FEP Cases at 711-12; 16 EPD ¶ 8223, pp. 5166-67 (App. B, 5a-11a, at 9a).]

The District Court concluded that, in light of the law established in *Rodriguez*, it would be *illegal* and *unjust* to follow the mandate of the Court of Appeals to compel the merger of the racially-segregated unions. Therefore, this suit was dismissed.

SUMMARY OF ARGUMENT

It is unnecessary in this case for this Court to reach the question of whether, and in what circumstances, an intervening change in decisional law may justify a district court's failure to comply with a court of appeals' mandate. Here there is no colorable argument that the decision on which the District Court relied constituted a change in decisional law as to any relevant legal principle.

The District Court relied on the fact that in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), this Court, having found the action not maintainable as a class action and no merit to the plaintiffs' individual claims, did not go

on to consider the legality of the no-transfer practice at issue. However, the District Court ignored the fundamental differences between the individual claims of the plaintiff-respondent in this case and *Rodriguez*. Here, as a person subject to and personally affected by the racial segregation of the locals and the 50%-50% rule, Mr. Bailey had an individual claim of being the victim of unlawful practices and the Court had to treat the question of the legality of the segregation and 50%-50% rule in order to dispose of that claim. In *Rodriguez*, the individual plaintiffs lacked the threshold qualifications that would make them subject to the rule which they were challenging; hence they could not be affected and were entitled to no relief, irrespective of the rule's legality. Thus, the *Rodriguez* Court's failure to treat the legality of the rule in no way calls into question the propriety of this Court's treating the issue of the legality of the system at issue in this case, nor its holding that the system was unlawful.

ARGUMENT—OR REASONS FOR DENYING THE WRIT

THE DECISION IN *EAST TEXAS MOTOR FREIGHT V. RODRIGUEZ* DOES NOT UNDERMINE, NOR DISTURB IN ANYWISE, THE LEGAL BASIS OF THE DECISION OF THE COURT OF APPEALS IN ANY RESPECT.

Whatever may be the circumstances in which a district court may disobey an appellate mandate because of intervening decisional law[3], there is no question that the intervening decision must at least be relevant—*Rodriguez* is not. Here, there is no colorable argument that the judgment of the Court of Appeals in this action is undermined, or disturbed, by any legal principle articulated or suggested in *Rodriguez*.

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[3] Compare **Lubben v. Selective Service System Local Board No. 27, 453 F.2d 654, 650 (1st Cir. 1972), Mayberry v. Maroney, 558 F.2d 1159, 1162 (3d Cir. 1977), and De Filippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977), with Thierault v. Smith, 519 F.2d 809 (1st Cir. 1975).**

In the prior appeal, the Court of Appeals held that Mr. Bailey, as a member of a racially-segregated union, was immediately subject to being deprived of employment opportunities in violation of § 703(c)(2) because of the inevitable fluctuation in the membership of the locals and the rule that the work be distributed evenly between them. As a member of the black union, Mr. Bailey was a person subject to the system who could challenge it because it affected him. Because Mr. Bailey was himself subject to these practices, the Court of Appeals was compelled to determine the legality of their application to him; having found them to be *unlawful* the Court of Appeals ordered their discontinuance through desegregation of the two locals.[4] The Court of Appeals denied rehearing and this Court denied further review.

Neither Mr. Bailey's ability to challenge the system nor the finding of a Title VII violation by the Court of Appeals or its command to the District Court to desegregate depended on whether the suit could be maintained as a class action. Desegregation would have been appropriate had Mr. Bailey never attempted to bring a class action, as other civil rights decisions make plain. See *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963); *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Brito v. Zia*, 478 F.2d 1200 (10th Cir. 1973).

By contrast, in *Rodriguez*, the plaintiffs were never subject to or personally affected by the unlawful practice which they were challenging because they never met the threshold requirements which would trigger its operation. Thus, unlike here, this Court was not required to examine the legality of the practice in order to dispose.

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[4] A court need not await the occurrence of actual harm to a plaintiff before determining the unlawfulness of a practice or before enjoining it when the threat of harm is impending and inevitable. **Blanchette v. Connecticut General Insurance Co., 419 U.S. 102,144 (1974); Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923).**

In *Rodriguez*, three Mexican-American city drivers brought an action, denominated as a class action, to challenge a trucking company's no-transfer rule (whereby a city driver could not become a road driver without loss of seniority) on the grounds that the rule perpetuated the past discriminatory hiring of minorities into city driver positions only. After trial, for reasons largely related to adequancy of representation, the court dismissed the class action claim, and found that the three plaintiffs could not in any event have been victimized by the no-transfer rule because they were not qualified for road driver positions. See 431 U.S. at 400.

This Court agreed; and held the plaintiffs not to be injured by the challenged no-transfer rule—and, hence, also not class members—because the district court had found them not to be qualified for road driver positions (and because they had stipulated that they had not been discriminated against in initial hire thereby making it clear that they could not be injured by the rule's alleged perpetuation of past hiring discrimination). The Court stated:

> The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury. Furthermore, each named plaintiff stipulated that he had not been discriminated against with respect to his initial hire. In the light of that stipulation they were hardly in a position to mount a classwide attack on the no-transfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned. 431 U.S. 403-04; footnotes omitted.

In short, the three plaintiffs could not have been victims of the hiring discrimination which the rule was alleged to

unlawfully perpetuate, nor could they at any time actually be subject to and personally affected by the rule since they could not become road drivers even absent the rule. In no event, therefore, would they be entitled to relief even if the rule were unlawful. The Court of Appeals was able to affirm the district court's denial of individual relief without considering the legality of the rule, as was done in the companion case to *Rodriguez, Herrera v. Yellow Freight System, Inc.*, 560 F.2d 1285 (5th Cir. 1977).

In finding *Rodriguez* relevant, the District Court in the present case ignored the total dissimilarity between the status of the plaintiffs in the two cases. Because the plaintiffs in *Rodriguez* were shown to have no claim against the challenged practice, irrespective of its legality, and were in any event never subject to being personally affected by it, their individual claims could be disposed of without consideration of the legality rule—indeed, a judicial determination of legality would have been an advisory opinion.[5] Here, however, because the plaintiff was the current victim of the practices he was challenging, subject to imminent harm, a judicial inquiry into their lawfulness was unavoidable. See *Blanchette v. Connecticut General Insurance, supra.* 419 U.S. at 144; see generally footnote 4, *supra,* at p. 9. Having properly reached the issue, the Court of Appeals held that the segregated locals and the 50%-50% rule inevitably would "tend to deprive" Mr. Bailey (and all other members of the locals) of employment opportunities, in violation of § 703(c)(2) of Title VII.[6]

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[5] See Preiser v. Newkirk, 422 U.S. 395 (1975); Coppage v. Kansas, 236 U.S. 1 (1915); Elgin National Watch Co. v. Illinois Watch Co., 179 U.S. 665 (1901).

[6] Because Mr. Bailey was subject to both segregation and the 50%-50% rule, the Court of Appeals was able to avoid deciding the question "whether segregated locals represent a per se violation of the 1964 Civil Rights Act." 528 F.2d at 557. Other courts of appeals which have treated the issue have found maintenance of segregated locals to constitute a per se violation. See United States v. International Longshoremen's Association, 460 F.2d 497 (4th Cir.), cert. denied, 409 U.S. 1007 (1972); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974). Moreover, subsequent decisions have found that being subject to a discriminatory work environment itself constitutes signifcant harm. See Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977); Gray v. Greyhound Lines-East, 545 F.2d 169 (D.C. Cir. 1976). A fortiori, exposure to explicit segregation constitutes signifcaint injury.

Rodriguez is totally inapplicable in this case. Nothing in **Rodriguez** calls into question the determination by the Court of Appeals that the legality of the practices was ripe for review or its holdings that the practices violated Title VII and should be enjoined.

In sum, Rodriguez casts no doubt upon any aspect of the earlier judgment by the Court of Appeals in this case. Desegregation of the two locals has already taken over nine years from the filing of the complaint—and three (3) years from the well reasoned opinion of the Court of Appeals. The full Court of Appeals and this Court have had an opportunity to review the prior judgment of the Court of Appeals. Further delays, based on the patently inapplicable grounds advanced by the petitioners and District Court here, simply ought not be tolerated. The District Court should, therefore, immediately be ordered to obey the mandate of the Court of Appeals.

The Court of Appeals has, in essence, via "declaratory judgment," appropriately enjoined the petitioners herein and other defendants in this suit from continuing to enter into collective bargaining agreements, by and between themselves in violation of § 703(c)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e-2(c)(2) and from perpetuating racially segregated locals proscribed under the Constitution and laws of the United States of America.

CONCLUSION

For the reasons stated above, the "Petition for a Writ of Certiorari" should be denied.

Respectfully submitted,

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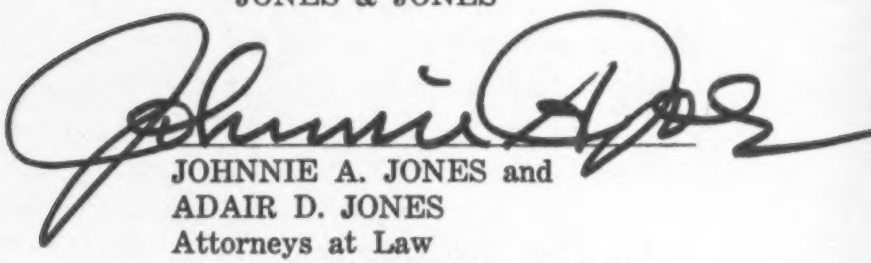

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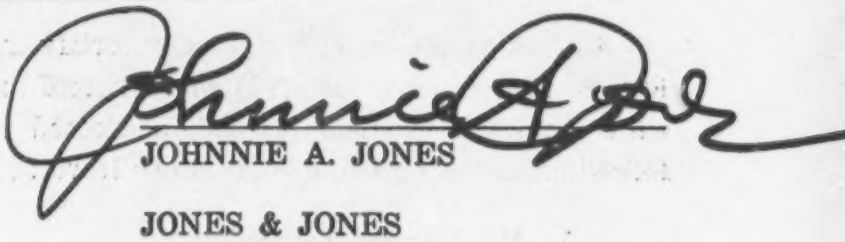

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